

<sup>1</sup> Although the Postal Service did not indicate on the envelope that Respondent had moved, in a subsequent pleading Complainant stated that Respondent no longer resides at that address and has not provided a current address to INS.

Complainant specifically moved the Court for an order dismissing the hearing request in accordance with 28 C.F.R. § 68.37(b) so as to avoid allowing “a document fraud respondent to defeat a Final Order by either initially providing a bogus address to the INS or simply moving to a subsequent address without notifying OCAHO or the INS after requesting a hearing.” Notice at 1-2. Complainant did not cite any case law in support of its motion.

After receiving Complainant’s motion, I issued a Show Cause Order stating that I could not find any support for Complainant’s request that when a complaint could not be effectively served, the request for hearing should be dismissed as abandoned. The Rules of Practice and Procedure clearly state that service of the complaint and notice of hearing are complete upon receipt by the addressee. 28 C.F.R. § 68.3(b). Therefore, since Complainant had been unable to serve or locate the Respondent, I ordered Complainant to show cause why the complaint should not be dismissed without prejudice. I also ordered Complainant to cite any cases which support the assertion that the request for hearing should be dismissed as abandoned. Complainant was ordered to file its response not later than May 31, 1995. As of this date, I have received no response from Complainant.<sup>2</sup>

Section 68.37(b) of the Rules of Practice, entitled “Dismissal - Abandonment by party,” provides that a complaint or a request for hearing may be dismissed upon its abandonment by the party or parties who filed it. A party shall be deemed to have abandoned a complaint or a request for hearing if:

- (1) A party or his or her representative fails to respond to orders issued by the Administrative Law Judge; or
- (2) Neither the party nor his or her representative appears at the time and place fixed for the hearing and either
  - (i) Prior to the time for hearing, such party does not show good cause as to why neither he or she nor his or her representative can appear; or
  - (ii) Within ten (10) days after the time for hearing or within such other period as the Administrative Law Judge may allow, such party does not show good cause for such failure to appear.

28 C.F.R. § 68.37(b).

This Rule of Practice has typically been used in cases in which a party or counsel fails to respond to orders of the Administrative Law Judge. See, e.g., United States v. Columbia Sportswear Manufacturers, Inc., 5 OCAHO 808 (1995); United States v. Broker’s Furniture and Manufacturing.

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<sup>2</sup> Ironically Complainant has failed to respond to an order issued by the Judge, which arguably could be construed as abandonment of the complaint, pursuant to 28 C.F.R. § 68.37(b).

Inc., 5 OCAHO 789 (1995); United States v. Erlina Fashions, Inc., 4 OCAHO 656 (1994). OCAHO case law demonstrates that in instances when a complaint cannot be effectively served it is dismissed without prejudice so that a complainant can refile the complaint if the Respondent is located and service can be accomplished. See, e.g., United States v. Baches-Corado, 3 OCAHO 571 (1993) (8 U.S.C. § 1324c document fraud complaint dismissed without prejudice when neither OCAHO nor the Immigration and Naturalization Service could serve the complaint and notice of hearing upon the respondent).

As I noted in the Show Cause Order, I have not found any support for Complainant's request that in the circumstance where a complaint cannot be effectively served, the request for hearing should be dismissed as abandoned. The Rules of Practice and Procedure are clear that "[s]ervice of complaint and notice of hearing is complete upon receipt by addressee." 28 C.F.R. § 68.3(b). The complaint and notice of hearing have not been received by the Respondent and therefore service has not been effective. In addition, the circumstances under which a request for hearing may be deemed abandoned, as previously quoted, have not occurred here. 28 C.F.R. § 68.37(b). Moreover, Complainant has not responded to the Show Cause Order and has not cited any cases which support its request that the Request for Hearing should be dismissed because Complainant is unable to effectuate service of the complaint. Therefore, Complainant's motion to dismiss the hearing request is denied.

The Rules of Practice and Procedure provide in pertinent part for service of a complaint and a notice of hearing by the Office of the Chief Administrative Hearing Officer, which may be accomplished by one of three methods; namely, hand delivery, leaving a copy at the office or residence, or by mail. 28 C.F.R. § 68.3(a)(1)-(3). However, the Rules also provide that, where OCAHO or the Judge encounter difficulty with perfecting service, the Judge may direct that a party execute service of the complaint. 28 C.F.R. § 68.3(c). In United States v. Dolan, 2 OCAHO 388 (1991), the respondent had refused to accept certified mail containing the complaint, and therefore the Judge ordered the complainant to make personal service of the complaint and notice of hearing within ten days and to notify the Court within five days after service had been effectuated. See also United States v. Sea Dart Trading Co., 2 OCAHO 336 (1991) (requiring Complainant either to effectuate service or to move to dismiss the complaint without prejudice).<sup>3</sup>

The next question is whether the complaint should be dismissed because Complainant has been unable to locate or serve Respondent. Complainant argues that to dismiss the action would permit a Respondent to defeat a final order by providing a bogus address or simply moving to a subsequent address without notifying the INS and thus frustrating service. Here Complainant has been unable to effectuate service because Respondent no longer resides at the address he provided to the Complainant [and apparently has not left a forwarding address]. Yet I note that the Notice of

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<sup>3</sup> In both United States v. Dolan, *supra*, and United States v. Sea Dart Trading Corp., *supra*, the complainant was able to effectuate service by hand delivery on the respondent, and therefore the complaints were not dismissed.

Intent to Fine is dated January 20, 1994, and Respondent's request for hearing dated March 13, 1994 was received by INS on March 16, 1994. Yet the complaint was not filed until January 11, 1996! Thus, the INS waited almost two years to file the complaint in this case. Given that amount of time, Respondent may not be attempting to evade service; he may have assumed that INS did not intend to pursue the matter since no complaint had been filed.

In any event, the Rules do not permit Complainant or this Judge to waive service of the complaint. While the Rules provide that a complaint may be mailed to the last known address of an individual, 28 C.F.R. § 68.3(a)(3), the Rules also specify that service of a complaint is complete upon receipt by addressee. 28 C.F.R. § 68.3(b). Consequently, since service of the complaint cannot be effectuated, this action cannot proceed at this time. In accordance with prior OCAHO case law, see United States v. Baches-Corado, supra, and United States v. Sea Dart Trading Corp., supra, the complaint is dismissed without prejudice to the government's right to refile the complaint if it can locate the Respondent so that service may be effectuated in accordance with the Rules of Practice and Procedure.

  
**ROBERT L. BARTON, JR.**  
**ADMINISTRATIVE LAW JUDGE**

## CERTIFICATE OF SERVICE

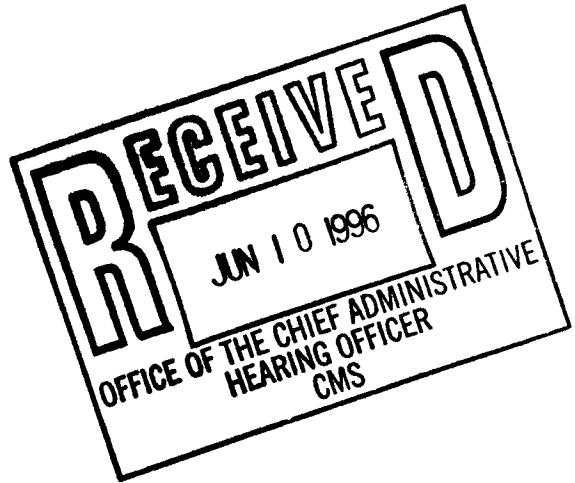
I hereby certify that on this 10th day of June 1996, I have served copies of the foregoing Order Dismissing Complaint Without Prejudice to the following persons at the addresses shown:

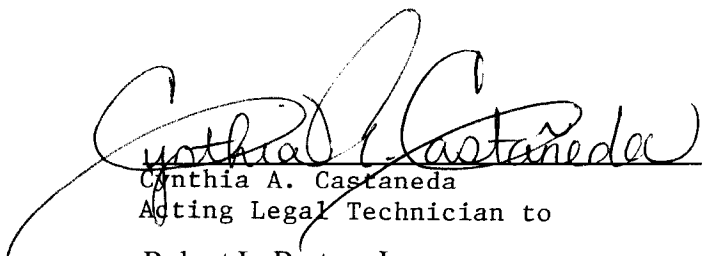
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